# United States Circuit Court,

**Eastern District of New York.**

OLIVER WENDELL HOLMES, Jr., Executor,

*Complainant,*

*vs.*

GEORGE D. HURST,

*Defendant.*

# Brief on Behalf of Complainant.

C. G. Burgoyne, Walker and Centre Streets, New York.—1896.

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## Brief on Behalf of Complainant.

This is a final hearing upon bill, answer and replication, and proofs which are presented in the form of an agreed statement of facts.

The case arises under the copyright law, and has relation to "The Autocrat of the Breakfast Table."

A single question is presented: Whether the publication of "The Autocrat of the Breakfast Table" in serial form in the numbers of the "Atlantic Monthly," in parts or fragments, as it was written, without copyright, was such a publication that it invalidated a copyright taken by the author upon the story as a whole after the concluding part or fragment had appeared in the magazine?

The defendant's case depends upon the proposition that the publication of the story in serial form in the numbers of the "Atlantic Monthly," as it was composed by the author, was a "publication" in the sense of the statutes whereby there was a forfeiture of the right of the author to acquire the statutory privilege.

If the defendant can maintain that proposition the bill should be dismissed. If he cannot maintain it there should be a decree for the complainant.

There is no doubt that the validity of the copyright depends upon the legal effect of the language of the statute. The sections of the Act of 1831, which was in force when the copyright was taken, and which are chiefly material, are as follows:

> "SEC. 4. And be it further enacted: That no person shall be entitled to the benefit of this act, unless he shall, before publication, deposit a printed copy of the title of such book or books, maps, charts, musical composition, print, cut, or engraving, in the Clerk's Office of the District Court of the district wherein the author or proprietor shall reside, and the Clerk of such Court is hereby directed and required to record the same thereof forthwith, in a book to be kept for that purpose, in the words following (giving a copy of the title, under the seal of the Court, to the said author or proprietor, whenever he shall require the same): 'District of to wit: Be it remembered, that on the day of *Anno Domini* , A. B., of the said district, hath deposited in this office the title of a book (map, chart or otherwise, as the case may be), the title of which is in the follow-

ing words, to wit: (here insert the title); the right whereof he claims as author (or proprietor, as the case may be); in conformity with an act of Congress, entitled "An Act to amend the several Acts respecting Copyrights." C. D., Clerk of the District."' For which record the Clerk shall be entitled to receive from the person claiming such right as aforesaid, fifty cents; and the like sum for every copy, under seal, actually given to such person or his assigns. And the author or proprietor of any such book, map, chart, musical composition, print, cut or engraving, shall, within three months from the publication of said book, map, chart, musical composition, print, cut or engraving, deliver, or cause to be delivered, a copy of the same to the Clerk of said district. And it shall be the duty of the Clerk of each District Court, at least once in every year, to transmit a certified list of all such records of copyright, including the titles so recorded, and the dates of record, and also all the several copies of books or other works deposited in his office according to this act, to the Secretary of State, to be preserved in his office."

There are other parts of the statute which tend to accentuate the part which has been quoted; and it contains nothing which in any degree makes in a different direction.

**The statutory provisions concerning copyrights,** as far as they affect the matter before us, have been substantially the same from the first.

The policy whereby a deposit of the book is required is older than our earliest enactment. Reference to it is found in the Act of 1790, since which provisions have been enacted and re-enacted repeatedly, as distinct expressions of A SETTLED AND INVARIABLE POLICY.

Referring to the statute of 1790 the Supreme Court, in Wheaton vs. Peters, 8 Peters, 664, say:

> "The acts required to be done by an author, to secure his right, are in the order in which they must naturally transpire. First, the title of the book is to be deposited with the clerk, and [2] the record he makes must be inserted in the first or second page; * * * and [3] within six months after the publication of the book, a copy must be deposited in the department of state.

Says Mr. Justice CLIFFORD, referring to the act of 1831, under which the copyright here involved was taken:

> "Deposit of the printed copy of the title of the book must be made before publication, in the clerk's office of the district court of the district wherein the author or proprietor shall reside, and he (the author or proprietor) must deliver a copy of the book to the clerk of said district court within three months from the publication of the same, else he is not entitled to the benefit of the act.
>
> "Such are the absolute requirements of the act of Congress; nor is it competent for the circuit court to disregard the requirements. (Wheaton vs. Peters, 8 Pet., 653; Reade vs. Conquest, 9 C. B. [N. S.,] 755)."

Chase vs. Sanborn, 6 Off. Gaz., 932.

And to the same effect are other cases relating to the statute of 1831 and those of later date.

Struve v. Schwedler, 4 Blatch., 23.
Boucicault vs. Hart, 13 Blatch., 47.
Parkinson vs. Laselle, 3 Saw., 330.
Merrell vs. Tice, 104 U. S., 557.
Callaghan vs. Myers, 128 U. S., 652.

The statute before us in all its parts contemplates the performance of each of the three essential acts in the order and under the conditions stated. And the requirements cannot be changed or modified to any material extent. There was no abridgment of the operation of forces which a compliance with the statute suspends, and no copyright, unless there was (1) a deposit of the title, (2) a deposit of a copy of the book, and thereafter (3) notice of the copyright.

For the purposes of the present argument the matter of notice may be laid out of sight, and it may be said that THE TWO FUNDAMENTAL AND ESSENTIAL STEPS relate to (1) the deposit of the title and (2) THE DEPOSIT OF THE COPY OF THE BOOK.

**The second of these fundamental conditions**—the deposit of a copy of the book (and which is chiefly material in the discussion before us)—had its origin in a well-defined policy which has been practically undisturbed for a period of nearly two hundred years. It may be said that from the first it has been made a condition, without qualification, that a copy of the copyrighted book be deposited for the purpose of increasing libraries. Our understanding is that THERE HAS NEVER BEEN A COPYRIGHT STATUTE WHICH DID NOT MAKE PROVISION FOR THE DELIVERY OF A COPY OF THE "COPYRIGHT BOOK" FOR USE IN A LIBRARY.

It is obvious that this policy had a real foundation in the interests of the public, and that it could only be effectuated by delivering the book in completed form adapted to convenient use.

The first Act of Parliament requiring delivery to libraries was passed in the reign of Queen Anne, in 1710, and it required that nine copies of the copyrighted book be delivered to the nine libraries which were specified. In 1801 the number of copies required to be delivered was increased to eleven. In 1836 the number was reduced to five copies, and the present Act of Parliament requires a copy to be delivered to the British Museum, the Bodleian Library at Oxford, the Public Library at Cambridge, the Library of the Faculty of Advocates in Edinburgh, and the Library of Trinity College in Dublin (Drone on Copyright, 83, 277).

As has been stated, the first statute of the United States made provision for the deposit of a copy, and since that date there has been no change except that the more recent statutes increase the number of copies and require them to be sent directly to the Library of Congress.

It thus appears that the statutory requirement that a copy of the copyrighted book shall be delivered was adopted in the United States in connection with the effectuation of a definite purpose and in pursuance of a policy fixed be-

yond the possibility of disturbance, and as old as the subject to which it relates.

**There is another rule which is not more recent** than that which has just been mentioned, which is to the effect that copyright must be taken "before publication." But there is no doubt that the word "publication" is of such a character that this rule is one which is in its nature distinctly different from that which requires a deposit of the book for use in a library.

In another connection we have discussed the nature of this rule and the meaning of the word "publication." Our contention is that "publication," like the word "writings" or "authors," is one of great elasticity, which, at the close of the nineteenth century, does not mean what it meant at the beginning of the eighteenth century.

We say, in short, that the word is one which may be liberally construed, which ought to be liberally construed, and which will be liberally construed, in connection with other parts of the statute, so as to effect the objects which the statute seeks to carry forward.

**In the case before us all the statutory requirements were complied with.** There was (1) a deposit of the title, (2) a deposit of the copy of the copyrighted book, and (3) there is no difference as to the application of the statutory notice.

According to the Agreed Statement of Facts, the author entered into an agreement with the publishers of the "Atlantic Monthly" whereby they acquired the right to print the book or story in parts, month by month, as it was written, the author by implication reserving the right to print and publish and copyright the book or story as a whole. There is no doubt about the intention of the author and publishers of the "Atlantic Monthly," and there is as little doubt that the book as a continuous volume was duly copyrighted in pursuance of the terms of the statute.

But it is said that before the title was deposited the author caused a serial publication of his book to be made in parts as it was written in the "Atlantic Monthly," and that that publication prevented the taking of a valid copyright upon the book as a whole.

The case turns upon the meaning of the words "before publication." If, when read in connection with the other provisions of the statute, they permit, without forfeiture, a qualified and restricted publication of the book in parts as it is written, such as was made in this case, the copyright is valid. If this generous construction is impossible the copyright is invalid.

**For the purposes of this case serial publication may be defined to be** the publication of the book in parts as it is being written. It is not in any right sense a publica-

tion of a number of different books or compositions, but of a siugle continuous book or composition as it is written.

In another connection the importance of serial publication is discussed at length. With the development of our periodical literature it has come to be customary for authors whose writings are desired by the public at the earliest practicable moment to publish their books in this way, in fragments or parts, usually in popular periodicals, and, after they have been completed, to put them out in "book form."

And we have also discussed, in another connectiou, the indisputable proposition that the statutory privilege of copyright is divisible, and that the right of serial publication may be segregated and disposed of without affecting the remaining part or parts of the privilege. If this proposition is not axiomatically true it is expressly recognized in the recent case of Stuart vs. Smith, 68 Fed. Rep., 189.

That the inchoate right of copyright may be divided is further deducible from the statutory provisions concerning renewals, which are also more fully discussed in another connection.

There was in the instance before us, actually or constructively, a sale by the author of the right to print or publish the book as it appeared in serial form in the "Atlantic Monthly," and the

remainder of the right of authorship in the premises was withheld by him and is the subject of the copyright upon which our suit is based.

## The Statutory Privilege of Renewal.

There is no room for difference of opinion as to the objects of the provisions concerning the second or extended term.

While it is obviously true that an invalid copyright is not rendered valid by an extension by the author or his widow or children of the original term, the effect of renewal under the circumstances of this case is unmistakably important.

We say (1) that that part of the inchoate right which became the vested right under the copyright on which our bill is filed was never abandoned; (2) that there was never the semblance of an intention to transfer the statutory right of renewal; and (3) that by virtue of the renewal the original term of the copyright relating to the book "The Autocrat of the Breakfast Table" was extended.

It was doubtless the intention of the author to reserve to himself the rights of authorship connected with the publication of "The Autocrat of the Breakfast Table" as a continuous book. It

was also his intention to reserve to himself and his widow and children the right of renewal.

A copyright based upon a right which he did not abandon or dedicate was taken in pursuance of the statute, and in pursuance of the statute that right was extended. Unless, therefore, the serial publication in the "Atlantic Monthly" with the consent of the author of the story in parts by the persons who had the right so to publish it operated to destroy the whole of the inchoate right, the "second copyright" now in force is valid.

The statutory privileges concerning renewals, or a second term of copyright, strongly support the proposition that the sale of the right of serial publication does not destroy the whole inchoate right.

In this instance the right to print the different parts of the story, as they were written as parts of the different numbers of the "Atlantic Monthly," was conveyed to the publishers of the periodical. They became the "proprietors" of that right in the sense of the statute, but their right did not extend beyond the covers of their periodical.

The right of serial publication thus transferred to them was in its nature essentially and distinctly different from that part of the inchoate right which the author retained.

To the right of serial publication in the periodical the right of renewal has no possible relation. The title of the publishers of the "Atlantic Monthly" was that of "proprietors" under certain definite limitations, and "proprietors" are excluded by the statute from the privilege of renewal. The author did not convey the privilege of renewal in respect of the right of serial publication, because the conveyance of the right of serial publication created a right which did not extend beyond the original term.

The only possible construction of the statute, therefore, justifies our contention that the segregation and alienation of the right of serial publication is not necessarily evidence of a total abandonment or dedication.

## Unless the Statute Prohibits Serial Publication the Copyright is Valid.

Whatever steps might have been taken by the author, if the statute is harshly construed, the privilege of copyright in the book in completed form—the copyright we have taken and seek to enforce—could not have been acquired. This, we think, may be demonstrated by a critical examination.

In the case before us, as in other instances where there is a serial publication, it may be said that four methods of procedure were possible:

**1.** It was possible to deposit the title, "The Autocrat of the Breakfast Table," and then proceed with the serial publication in the "Atlantic Monthly," depositing each of the parts as it was printed.

If this course had been pursued, as is more fully explained hereinafter, there would have been no deposit, according to the true intent and meaning of the statute, of a copy of the "copyright book" which we copyrighted.

**2.** It was possible to deposit the title, "The Autocrat of the Breakfast Table;" then to publish in the "Atlantic Monthly" in serial form, and then to print and publish a continuous volume.

This course would have corrected the difficulty which has just been mentioned; the Library of Congress would have contained a copy of "The Autocrat of the Breakfast Table." But, according to defendant's theory, the delivery would not have been made within three months from publication. The whole book would have been "published" before the completed volume was delivered.

3. It was possible to deposit and publish each of the twelve parts, taking twelve copyrights, upon twelve books, so-called, with twelve different titles.

In view of the obvious difficulties connected with the other methods which have been mentioned, it is probable that defendant's counsel will suggest this third one as being that which ought to have been adopted. If it is not according to the spirit and letter of the statute, the Court, we submit, will be compelled to decide either that the statute prohibits publication in serial form, or that a publication in serial form, under the circumstances of this case, is not that publication which the statute contemplates as constituting a forfeiture of the author's rights.

4. A fourth method which was open to the author was to take thirteen copyrights; twelve upon the twelve different parts of the book as they appeared, and one upon the book as a whole.

It will be conceded, for purposes of argument, that this fourth method is, to all the intents and purposes, the one which was adopted. The taking of the twelve separate copyrights upon the twelve separate parts of the book was, as affecting the thirteenth copyright upon the book as a whole, equivalent to a dedication and abandonment of the parts, one by one, as they appeared.

Assuming, for the moment, that each of the twelve parts of the book was a "book" in the sense of the Act of 1865 (13 Stat. at L., 540), and the proper subject of a copyright as such, our contention is that there was an inchoate copyright upon each of the twelve "books" or parts as it appeared, and an inchoate copyright upon the book as a whole—the copyright which was taken. We say that there can be no construction of the statute which makes the copyrights upon the twelve different parts of the book the same in contemplation of law as the copyright upon the book as a whole.

The taking of the twelve separate copyrights did not exhaust the inchoate right. There was a residuum, which was that part of the right which was connected with the book as a whole. This is the only possible conclusion. That residuum remained in the author in this case because it was never abandoned or dedi-

cated; and it was the basis of the copyright to which we seek, by the bill of complaint, to give effect.

That the taking of the twelve different copyrights, one after the other, is not the same as the taking of the copyright upon the book as a whole, may be easily demonstrated.

"The Autocrat of the Breakfast Table" is, to all the intents and purposes, a continuous story in connection with which there is a "sustained effort" from the first page to the last. Its arrangement in twelve parts was simply the division of the book into twelve chapters. No one of them is complete in itself; no one of them is in any possible sense Dr. Holmes' delightful and instructive book, "The Autocrat of the Breakfast Table."

There is no doubt that, TO OBTAIN A VALID COPYRIGHT UPON "THE AUTOCRAT OF THE BREAKFAST TABLE," IT WAS ESSENTIAL THAT THERE BE DEPOSITED THE PRESCRIBED COPY OF THE BOOK. No matter what course was pursued, if, at the end of the last step, there had not been deposited A COPY OF THE BOOK, IN COMPLETED FORM, all that was done was nugatory to create the statutory privilege in respect of the book as a whole.

If the twelve copyrights had been taken, and copies of the twelve chapters, fragments or parts deposited, there would have been a deposit of twelve distinct books; and it is certain that no one of them would have been "The Autocrat of the Breakfast Table."

The statute requires that there shall be a delivery of a printed copy of the title of the book and a copy of such "copyright book." If, in this instance, it can be reasoned, in connection with the taking of twelve copyrights, that there would be a deposit of the title, there would certainly be no deposit of a copy of what is unmistakably the "COPYRIGHT BOOK," which is the subject of our copyright here. There would be no deposit of THE "COPYRIGHT BOOK," WHICH IS SPECIFICALLY AND DISTINCTLY THE SUBJECT OF OUR STATUTORY PRIVILEGE.

Referring to Section 4956 of the Revised Statutes, which provides for the deposit of the title and two copies, a text writer says:

> "In the examination of this question the fact has not been overlooked that, in that part of the statute which requires two copies of every copyrighted book to be deposited in the Library of Congress, the word 'copy' must be taken to mean a transcript of the entire work.
>
> "But the intention of Congress in making this provision is obvious, and that intention would clearly be defeated by holding that a substantial and not a verbatim copy was meant" (Drone on Copyright, 490).

The intention, or part of the intention, of Congress, as applied to this case, was that there should be deposited a copy of 'The Autocrat of the Breakfast Table,'" not pages or sheets divorced from each other in many ways—untitled, unpaged, unbound and unconnected—but united and bound together to constitute a continuous and homogeneous whole, "The Autocrat of the Breakfast Table."

It is a not less significant and conclusive circumstance that the publication of the book in twelve separate parts is to be regarded as a practical impossibility. We do not mean to say that it would be a physical impossibility to print the different parts with their different titles and place them on the news-stands or offer them in some similar way. It is, however, none the less obvious that no publisher would undertake to put out a novel, issuing it from month to month in detached parts.

But it may be suggested that our magazines afford a means of accomplishing publication which may be availed of. We here encounter, in a more accentuated form, the difficulty to which reference has just been made. It would be absurd to say that the twelve numbers of the "Atlantic Monthly" in which "The Autocrat of the Breakfast Table" appeared constitute a "copyright book" the title of which is "The Autocrat of the Breakfast Table." The twelve

numbers of the "Atlantic Monthly" might, with propriety, be deposited with the Librarian of Congress, but they would be copies of numbers of the "Atlantic Monthly," no more and no less. They would not constitute, actually or constructively, a copy of "The Autocrat of the Breakfast Table."

And the taking of many copyrights upon many parts of a book is also obnoxious to the objection that it excludes the author from the enjoyment of the full statutory term of copyright. He begins by writing an introduction to his story, and that introduction he copyrights. He then writes an additional chapter or two, and these he copyrights, and goes on until he finishes his book. He will thus have taken twelve different copyrights which expire at twelve different dates. The introduction of his book will be *publici juris*, while the concluding part will be protected by copyright. Such a condition of things is not consistent with what was contemplated by the statutes concerning copyright.

But, as has been suggested, the question here to be determined is not whether under the statute the author could have taken twelve separate copyrights which would have been valid. The question is whether any one of those twelve copyrights, or all of those twelve copyrights combined, are a copyright in the sense of the

statute upon "THE COPYRIGHT BOOK" WHICH IS THE SUBJECT OF THE COPYRIGHT UPON WHICH OUR BILL IS BASED. Do they separately or collectively constitute THAT PARTICULAR PRIVILEGE which is the subject of the copyright upon "The Autocrat of the Breakfast Table" as a whole?

One of two constructions is possible: It may be held (1) that the serial publication destroyed the whole inchoate right, or (2) that the serial publication, *pro tanto*, restricted that right. We respectfully submit that the second view is a possible one, and that if it is possible it will be adopted.

## The Construction Which We Seek Tends to Give Effect to the Object of the Constitution.

The liberal construction for which we contend gives efficiency to the statute "to promote the progress of science" by stimulating the production and early publication of literary compositions of all kinds.

The defendant's proposition is that no right of copyright can be acquired in a book as a whole when there has been a prior publication of the book in parts. His argument is that printing in a periodical is "publication" in the sense of the statute, and that there is no exercise of the mind of the author in bringing the parts together and arranging them as a continuous volume.

It will hardly be said that this proposition is one which should be accepted from choice. It can, we think, be justified only by showing that no other conclusion is possible.

The defendant's contention deprives the public of the benefits of serial publication, or the appearance of books as they are written; and the complainant's contention causes the presentation of the book as it comes from the author's pen at the earliest practicable moment. By one construction the enjoyment of the book by the public is hastened; by the other it is materially delayed.

In the United States there is a vast mass of periodical literature in which books are printed in serial form. Nearly all the great newspapers of the United States, circulating copies beyond number, contain some form of serial. There are hundreds of periodicals—quarterly, monthly, fortnightly and weekly—which are, perhaps, chiefly important by reason of the serial contributions by authors of established reputation. What are known as "syndicate stories," written by the most eminent writers, are published simultaneously in many different places.

It is not going too far to say that the stories thus published in serial form represent the thought and labor of the best writers of certain classes, and are among the means by which the evolution of certain kinds of literature of standard importance is accomplished.

The works of the strongest writers of fiction are published in this way; and the same is true of authors of other classes. Perhaps writers of every class in every field of literature have at times preferred to present their works as they were written in serial form.

And the reasons why they would naturally desire to do so are manifest. The expression of opinions concerning current events, the description of incidents which have just taken place, the appeal to some existing taste or belief, all

require that the appearance of that which is written shall not be unduly delayed.

It requires no argument to convince the impartial mind that the objects of our Constitution and the policy of the statutes contemplate that the writings which are about to be produced shall be utilized in every practicable manner. It was not intended that the productions should be withheld from the public, but that their delivery should be hastened. The object was to stimulate, to develop, to broaden, "TO PROMOTE," the growth of "science" in every practicable way.

In the case before us the defendant's proposition is that the statute should be so construed as to embarrass and delay an influence and inducement which is a most important factor in the evolution of our literature. This circumstance is fundamental and of controlling importance.

## The Construction We Suggest Protects the Rights of the Public.

While it has been sometimes said that statutes which create the statutory privilege of copyright are in derogation of the common law, the better view is that they are operative to restrict only that part of the common law which has ceased to be important. At the close of the nineteenth century copyright is not odious as a monopoly; it is rather a reward or price paid by the public for that which the public greatly desire to enjoy.

The decisions of the Supreme Court abundantly support the proposition that the statutes will be liberally construed so as to effect the objects for which they were enacted. They will not be so read as to defeat any substantial right which they have left untouched growing out of the common law, nor will they be given a specious meaning for the purpose of emphasizing an antagonism between the author and the public. They will be read, we submit, so as to protect, if possible, both the public and the author to whom the public desire to grant the privilege.

In the instance before us there is no difficulty in arriving at the conclusion that the copyright may be sustained without in any degree defeating or postponing the rights of the public.

For the purposes of argument it may be said that the statutory privilege was divided by the

author. It may be said that the privilege of serial publication was segregated from the privilege of publication in book form, and that the privilege of serial publication was abandoned or dedicated to the public. If this is conceded, the segregation and abandonment of the specific privilege of serial publication did not necessarily operate as an abandonment of that part of the privilege which we now seek to make effectual.

There is no doubt that the privilege of copyright is divisible. It is manifestly true that Dr. Holmes sold to the publishers of the "Atlantic Monthly" the right to print his story, as he wrote it, in serial form. But he sold nothing else. If the book had been completed before the serial publication was commenced he could have sold the serial rights and retained all other rights.

Says Judge SHIPMAN in the Britannica cases:

> "It is, however, contended that while a copyright may be assigned as a whole by a written instrument, it cannot be subdivided, but is an entire thing, indivisible and incapable of apportionment. The statute simply provides that copyrights are assignable at law by an instrument in writing, and, obviously, the whole or an indivisible part thereof may be assigned so that the copyright may become 'the undivided property of joint owners' (Drone on Copyright, 334). * * * There is no restriction upon the power of the proprietor to assign, and transfer, in equity, an exclusive right to use the copyright book in a particular manner or for particular purposes upon such

> terms and conditions as may be agreed upon. In such case the legal title remains in the proprietor; and a beneficial interest, to the extent which is agreed upon, vests in the other party, who has acquired an equitable right in the copyright, and who will be properly styled an 'assignee of an equitable interest' (Curtis on Copyright, 225)" (42 Fed. Rep., 621).

And it has been specifically decided that the right of serial publication in a magazine is a separable part of a copyright, which may be disposed of as such.

Stuart vs. Smith, 68 Fed. Rep., 190.

That the inchoate right of copyright may be divided is further deducible from the statutory provisions concerning renewals. Our statutes from an early period have provided for an extended term or renewal. The provisions for a renewal have always been the same in one important particular.

In the words of Mr. Justice WOODBURY "an extension (or renewal) looks entirely to the author and his family and not to assignees" (Pierpont vs. Fowle, 2 Wood. & Min., 42).

In Cohen vs. Banks (Law's Copyright, etc., Laws, 30) Mr. Justice NELSON in this Court held that, where it is plain that the author intended to transfer both the original and the second term, a court of equity will direct the contract to be reformed according to the intention of the

parties. And in the case just cited it was held that the word "copyright" should not, in a doubtful case, be extended by construction to include both the original and the second or extended term.

It is thus demonstrated that the right of serial publication may be segregated and separated from the privilege as a whole.

There is nothing in either the letter or spirit of the statute which negatives the proposition that the privilege may be divided into two parts: (1) the privilege of serial publication, and (2) the privilege of publication in the form of a continuous volume.

We may assume that such a division was made in the present case, and that the privilege of serial publication was dedicated and abandoned to the public. And upon this assumption the inquiry before us is reduced to the question whether such a dedication and abandonment necessarily operated as a dedication and abandonment of the whole of the statutory privilege. We think there is no difficulty in reaching the conclusion that the abandonment of the privilege of serial publication did not operate as an abandonment of the whole privilege.

It is plain that it cannot be reasoned that there was an intention to abandon the entire privilege. Whatever there is of argument in favor of a

forfeiture must be based upon a theory of constructive abandonment growing out of the rights of the public.

In ascertaining the rights of the public in the premises the safest and most logical course is to determine whether, if the copyright be sustained as we propose, the rights of the public will be unduly restricted.

Every statutory privilege is, in effect, a contract between the public and the beneficiary. An agreement is made by which, in consideration of the production of a new work or invention, the public agree that the beneficiary shall, for a definite period, enjoy the exclusive privilege. But under all circumstances the period of enjoyment must be limited to the term fixed by the statute. The executive department is absolutely without power in any way, directly or indirectly, to exclude the public for a longer time than the statute enacts (Miller vs. Eagle Mfg. Co., 151 U. S., 186). IF THE PUBLIC ARE NOT EXCLUDED, DIRECTLY OR INDIRECTLY, FOR A LONGER TERM THAN IS FIXED, THEN THERE IS NO RESTRICTION or impairment of the rights of the public, and no foundation for the argument of constructive abandonment.

It is not less certain that the public take by abandonment or publication no more than they

get upon the expiration of the term of the statutory privilege. When the book is published under the protection of copyright the public are excluded for a definite period, and at the end of that period come in and take exactly what they would have taken if the book had been abandoned.

And, if there is an abandonment of the right of serial publication, the public get exactly what they would have been excluded from if the serial publication had been protected by numerous copyrights taken upon the different numbers of the publication as each part appeared.

In other words, in one case the right of serial publication is delivered to the public by abandonment, and in the other case the same right is withheld from the public, and, in a false sense, acquired by copyright.

In this instance the public have enjoyed the large benefit of a serial publication of our book. All that is included within the right of serial publication is *publici juris*. From the full and unrestricted enjoyment of that right the public have not been, and cannot be, excluded. It may be said that it was dedicated and delivered, and may be availed of in every way without let or hindrance.

The public are in exactly the same position as if there had been copyrights on the different

parts of the serial publication and those copyrights had been held to be invalid or had expired.

To make the act of serial publication a forfeiture of the whole right to the privilege is to give to the statute a harsh and unwise construction. It is to make the reasonable dedication to the public of one part of the right an excuse for taking the whole right. It is to say that the statutory privileges cannot be divided and the serial rights donated to the public. It is to refuse to intelligently define the meaning of the word "publication" so as to give to the author, as well as the public, the benefit of a liberal construction. It is, in brief, to hold that the dedication or abandonment of a specific part of the right to the privilege is necessarily the abandonment of the whole.

If there is any doubt in this connection we submit that it should be resolved in favor of the author BECAUSE THE CONSTRUCTION WE SEEK TENDS TO "PROMOTE THE PROGRESS OF SCIENCE" by giving the book to the public at the earliest practicable moment, as it is being written.

In this instance, if Dr. Holmes had withheld his book from the public so as to take the copyright after it was completed, it might never have been written, and if written the public would have been excluded from its use during the period of its preparation.

The course which was pursued effectuated the true objects of the statutes, and, without prejudicing the rights of the public, protected those of the author.

**The evolution of judicial thought in connection with the subject of copyright** is clearly defined in adjudications relating to the interpretation of both the Constitution and the statute.

The organic provision is as follows:

> "Congress shall have power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The word which chiefly defines the power to grant what are known as "copyrights" is "writings." The Constitution contains no delegation of the power to grant copyrights except in these words:

> "Congress shall have power to promote the progress of science and useful arts by securing for limited times to authors * * * the exclusive right to their respective writings."

The interpretation of these words depended upon the rule of construction which was adopted by the judicial department.

By applying an important maxim it was possible to say that the words should be strictly construed so as to limit the power. It was possible to reason that the words "authors" and "writings" had at the time the provision was formulated well-settled meanings about which there could be little room for difference of

opinion. It was possible to say that by connecting the word "authors" with the word "writings" the provision was given a meaning which was too clear to admit of expansion by construction; that at the end of the eighteenth century the word "writings," as a word, apart from its context, meant, and meant only, "anything written or expressed in letters;" that the constitutional provision had relation to authors of books or things written or expressed in letters; —and this line of reasoning would have been justified by the early history of copyright—by much which had taken place prior to the time of the adoption of the organic provision.

It was possible for the judicial department to have thus accurately construed the language of the Constitution, and it is manifest that to have done so would have been to depart in no respect from its letter, nor from its spirit—as its spirit was at the time when its letter was adopted.

It is not less certain that another and radically different rule of interpretation suggested itself to the judicial branch. According to this other rule, the object of the constitutional provision was considered—"Congress shall have power TO PROMOTE THE PROGRESS OF SCIENCE."

It was possible to give to the words "science," "authors," "promote," comprehensive meanings. In brief, it was possible, by giving to the lan-

guage of the provision the greatest possible elasticity, effectually "to promote" the manifest objects for which it was adopted.

It became necessary for the courts to choose between these two rules of construction: (1) The narrow rule by which the words were accurately defined, and (2) the broad, elastic rule by which the true purpose of the organic law was effectuated.

In its wisdom, and abundantly justifying its place and function as a co-ordinate part of our Government, the Supreme Court has emphasized its choice. Whatever the word "writings" may have meant in 1787, as part of our Constitution it is a word of the most inclusive character. It means to-day anything and everything which is the result of that kind of mental operation which produces a book or writing. A figure or group of figures in marble or bronze, a design or bas-relief in stone or metal, or wood—even a photograph or a negative thereof—is a "writing" in the sense of the organic word. Raphael's Madonnas, Corot's landscapes, the groups of MacMonnie, Bartholdi's heroic figures, and the many representations thereof by photography and similar arts, are all "writings."

Those who, with unimpeached and unimpeachable wisdom, have given this elasticity to the word, have read it in the light of the great object which it was intended to promote.

The same rule of interpretation has been applied in other connections. Its application is conspicuously illustrated in the judicial deliverances relating to the word "commerce." When the Constitution was adopted the word "commerce" meant much less than it means to-day. But the wisdom of the judicial department has given it greater and greater elasticity and value, until we perceive that it is of the most inclusive character.

Telegraphy was wholly unknown in 1787, and the word "telegraph" had not been coined. But it has been held in our national court of last resort, and with indisputable wisdom and consistency, that the word "commerce" as used in the Constitution includes telegraphy. Speaking for the Court, Chief-Justice WAITE says:

> "The powers thus granted are not confined to the instrumentalities of commerce * * * known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new development of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these agencies are successively brought into use to meet the demands of increasing population and wealth" (96 U. S., 9).

It is thus demonstrated that legal science defines the words which were used yesterday according to the light and reason of the things

The most recent decisions emphasize very strongly the importance of "the original right of the author," and illustrate the tendency of judicial thought in the direction of increasing breadth and liberality.

In the interpretation of that part of the statute which relates to publication, it must necessarily be true that the words of the statute will be interpreted according to the same enlightened doctrine which has added value to the words of the organic law.

**The decision of the case depends upon the rule of construction which is to be adopted in the interpretation of the word "publication."** If that word is to be so construed as to give it a narrow meaning, the case is with the defendant; if it is to be construed liberally, and so as to the more effectually promote the progress of "science," the case is with the author.

We respectfully submit that there is no doubt whatever that it is possible to so construe the word "publication" as to (1) effectuate the objects of the organic provision, (2) protect the rights of the public, and (3) protect the rights of the author and recognize the validity of the copyright.

And a construction which will accomplish these important results is one which must commend itself to the judicial mind.

It is an important circumstance that the existence of the statutory privilege which has resulted from the acts of the owner of the copyright is *prima facie* evidence in his favor (Black vs. Allen Co., *supra*). The presumptions are that there was no abandonment of the right; and in this case these presumptions are of especial force by reason of the fact that the copyright was taken as soon as the book was completed, and before it had appeared in any form except

from time to time as it was being written in the numbers of the "Atlantic Monthly."

It is familiar law that abandonment will not be presumed:

> "Abandonment or dedication of an invention to the public, being in the nature of a forfeiture of a right, is not favored in law" (Jones vs. Sewall, 3 Cliff., 563).
>
> "It must result from the intention of the patentee expressly declared or clearly indicated by his acts" (McMillen vs. Barclay, 3 Fish., 377).

To the same effect are a great number of cases which need not be cited in support of a proposition so elementary and well-defined.

It is fundamentally important that the word "publication" is a word of a very comprehensive and elastic character. In all of the numerous connections in which it has been used it is without definite meaning, exceptionally inexact, and a proper subject of construction.

When applied in connection with the promulgation of a law "publication" signifies, in effect, rendering public the existence of the law.

As used in chancery practice in connection with the opening of depositions it means that liberty is given to break the seals, open the depositions and give out copies of them.

When used in connection with a libel it refers to a communication to a third person. What constitutes a "publication" in the law of libel is

a question which has been discussed for many years without approaching an attempt to give a definite meaning to the word.

The publication of a will means that the testator has done some act from which it can be concluded that he intended the instrument to operate as his will.

What the word "publication" means, as used in the statutes of the United States relating to copyrights, is, to a great extent, an open question. There are certain acts which necessarily constitute what is known as "publication." Thus, there may be a formal dedication or abandonment, or there may be an unrestricted or unqualified sale or gift to the public of the subject of the copyright. It has been held that the unrestricted sale of a single copy of a book fixes the date of publication.

But indefinite acts, IN CONNECTION WITH WHICH THERE WAS NO INTENTION TO ABANDON OR DEDICATE, either constitute or do not constitute publication according to the circumstances of the case.

If there ever was a time when, in its relation to the subject of copyright, "publication" meant simply "making known to the public," that day has gone by.

Reflection will make it plain that there is no publication in the sense of the statute until the

right to the privilege is formally abandoned by acts which admit of no doubt. The ship is not "published" until the last wedge is knocked from under her keel and she goes down from her seclusion to become a part of the commerce of the world. It is not going too far to say that "publication" is almost wholly a matter of intention.

A statue is not "published" until the veil which covers it is formally lifted. It is what is called "unveiled," and is thus "published." It may remain in the artist's studio, seen of all men, while its author hesitates to determine whether he may not accentuate it in one place and reduce its lines in another. He may exhibit it to whoever enters his studio. He may invite his friends to see it and explain every detail; he may solicit the criticism of other sculptors to any extent; but, just so long as he prefers to contemplate the possibility of any change, it continues to be a private work and unpublished.

And in the case of a picture: it may stand upon the easel of the artist for an indefinite period; he may consider every detail and know not that he shall again consider them, but the law does not enter his studio in the person of the critic or visitor, or, it may be said, the full-fledged pirate, and appropriate or steal the picture, even though it may long since have received the last touches of the author's brush.

There is no doubt that, in the case of books, distribution for the purposes of sale is not publication in the sense of the statute.

> Black vs. Allen Co., 56 Fed. Rep., 764; Bill Pub. Co. vs. Smythe, 27 Fed. Rep., 914; Wall vs. Gordon, 12 Abb. Pr. R., N. S., 350; Drone on Copyright, page 291.

And if books were sent out and published without the consent of the author his right to a copyright would not be invalidated (Boucicault vs. Wood, 2 Biss., 34, 39; Crowe vs. Aiken, *Ib.*, 208; Palmer vs. De Witt, 2 Sweeny [N. Y.], 530; 47 N. Y., 532; Shook vs. Neuendorf, 11 Daily Reg. [N. Y.], 985; and cases just cited).

It is familiar law that the public performance of a dramatic composition, no matter how long continued, does not constitute "publication" (2 Sweeny, 557; 2 Biss., 208). The same is true of the delivery in public of a lecture or address (5 Blatch., 98) or the public rendering of a song or musical composition (*Ib.*). Letters regularly delivered to the person to whom they are addressed are not necessarily "published" (2 Atk., 342; 32 Beav., 462).

The fact that the public may be fully informed as to the subject of a copyright, and be able without assistance to reproduce it, does not, in itself, tend to create a public right.

The statute is not as if it read:

> "No person shall be entitled to a copyright unless he shall, BEFORE THE SAME IS MADE PUBLIC, deliver at the office of the Librarian of Congress," &c.

It is as if it read:

> "No person shall be entitled to a copyright unless he shall, BEFORE ABANDONMENT BY PUBLICATION, deliver at the office of the Librarian of Congress," &c.

To constitute a publication it must appear (1) that the public have been placed in possession of a knowledge of the subject of copyright, and (2) that there has been an abandonment or dedication, actual or constructive, by the author or proprietor.

If in any case both of these facts are established, it must be concluded that there has been a "publication;" if only one of them is established, the necessary conclusion is that there has not been a publication. In this instance, the first condition is established; the public have been placed in possession of a knowledge of the book; but the second condition is not satisfied—there has been no abandonment or dedication, actual or constructive, of the whole of the right to acquire the statutory privilege in all its parts.

The proposition that there has been an abandonment or dedication is unsupported by any fact except that of serial publication by the

author in the "Atlantic Monthly" as the story was being written. There is absolutely no evidence of an intention to abandon; it may be said that IT IS CERTAIN THAT THE AUTHOR DID NOT INTEND TO ABANDON THAT WHICH IS THE SUBJECT OF THE COPYRIGHT WHICH HE OBTAINED.

The defense is thus reduced to the proposition that as matter of law the serial publication was a constructive abandonment of THE WHOLE OF THE RIGHT to the statutory privilege. And this proposition, we submit, for reasons set forth in another connection, cannot be maintained.

Excluding that which is connected with the renewal period or "second copyright," the right is divisible into (1) that part which is known as the right of serial publication, and (2) that part which contemplates publication of the volume as a whole (Stuart vs. Smith, *supra*). As matter of law, in view of the language and objects of the statute, the act of the author—the serial publication—was a constructive abandonment of the right of serial publication. That part of the right it must be held he intended to abandon. But beyond this the conclusion does not go. It draws a line which leaves untouched that part of "the original right" which became

a vested right, and which is the copyright, which by this suit we are seeking to enforce.

This is a possible construction. It preserves the rights of the public, and it gives to the author that which the organic law and the statute contemplate. It is a necessary construction if the statute is liberally interpreted.

We respectfully submit that the copyright upon which the suit is based is valid.

There is no doubt whatever that the only possible question arises in connection with the serial publication. Of the "original right of the author" there is no room for the color of controversy. "The Autocrat of the Breakfast Table" was, in the most sufficient sense, a creation of this author's mind.

The word "publication," whether it be considered in the abstract or in the concrete, is an elastic word, having no inflexible meaning.

The whole reason and policy of the Constitution and the statute enacted to give it direction and effect contemplate the promotion of literature as distinguished from that which tends to retard its growth. Whatever delays or postpones, or in any way embarrasses, the growth of literature, antagonizes the spirit of the statute and the organic provision upon which the statute is based.

The serial publication of a book like "The Autocrat of the Breakfast Table," as it is being written, tends to effect the objects of both the organic and statutory provisions. To deliver such a book, at the earliest practicable moment, to the public who are seeking it, is to "promote the progress" of letters. It can be delivered at the

earliest practicable moment only by printing and publishing it as this book was printed and published—in serial form as it comes from the pen of the author.

If the proposition of the defendant is accepted, it must be held that the statute prohibits and prevents serial publication and the division for the purposes of serial publication of the right to acquire the statutory privilege. The complainant's view makes serial publication possible without in any degree impairing or postponing the rights of the public.

This is our case: The inchoate right of copyright is divisible.

It consists generically of a right to (**1**) an original term and (**2**) an extended term.

The right to the original term includes the right of serial publication as the book is being written plus the right of publication of the book as an entirety.

The dedication or abandonment of the right of serial publication as the book is being written is not necessarily an abandonment of the whole right. The extent of the dedication or abandonment is governed by the intention of the author.

In this instance the inchoate statutory privilege was (accepting the defendant's contention) divided into thirteen parts. Constructively,

thirteen copyrights were taken, each having relation to a different subject. The copyright book which was the subject of the last or thirteenth copyright was not "the copyright book" of any one of the other copyrights, and, under the statutes, could not have been made the subject of any of them.

It is a conclusion of law that there was a forfeiture or abandonment of the right to the twelve constructive copyrights which had relation to the publication of the book in serial form as it was written.

It is not a conclusion of law that there was a forfeiture or abandonment of that part of the inchoate privilege which was the basis of the thirteenth or last copyright upon the book as an entirety.

The right being divisible and the presumptions in favor of the author, the Court will not extend the forfeiture or abandonment beyond the limits fixed by the author.

If the original copyright, based upon that part of the right which was not abandoned, was valid, there is no room for difference of opinion as to the validity of the copyright as taken for the second term, and no doubt about the infringement.

And the Court will accept the liberal view of the case because the fundamental objects of the Constitution and the statutes are promoted, while the interests of the public, as well as the rights of the author, are in no degree impaired or prejudiced.

There should be a decree in favor of the Complainant.

ROWLAND COX,

*Of Counsel for Complainant.*